

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA,  
NORTHERN DIVISION**

LEE HARTWELL,	) Case No.: 2:06-CV-518
Plaintiff,	) <b>DEFENDANTS' OBJECTION TO</b>
	) <b>PLAINTIFF'S PROPOSED JURY</b>
	) <b>INSTRUCTIONS</b>
vs.	)
THE CITY OF MONTGOMERY and THE	)
PERSONNEL BOARD FOR THE CITY AND)	)
COUNTY OF MONTGOMERY, and KELLY	)
GORDON	)
	)
Defendants.	)
	)
	)

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COME NOW City of Montgomery and Kelly Gordon, by and through undersigned counsel, and object to the proposed jury instructions submitted by the plaintiff in document number thirty-seven, and in support thereof, say as follows:

Plaintiff's proposed jury charge purports to instruct the jury on three factors that it must determine in this case, including the question of whether or not the subject speech involves a matter of public concern. The plaintiff cites to Cook v. Gwinnett County School District, 414 F.3<sup>rd</sup> 313 (11<sup>th</sup> Circuit, 2005) in support of his jury charge. In that case, the 11<sup>th</sup> Circuit held that whether or not the speech involved a matter of public concern and whether the employee's free speech interest were outweighed by the employer's interest in effective and efficient fulfillment of its responsibilities (elements 1 and 2 of the 4 step analysis set out in Cook) were questions of law to be determined by the court and not the jury. Cook v. Gwinnett County School District, 414 F3<sup>rd</sup> 313, 318 (11<sup>th</sup> Circuit, 2005). The only issues for the jury to determine in this case, then, are elements 3 and 4; whether or not "the speech played a substantial part in the adverse

employment action,” and whether or not “the employer would have made the same decision even in the absence of the protected speech.” Cook v. Gwinnett County School District, 414 F3<sup>rd</sup> 313 (11<sup>th</sup> Circuit, 2005).

The jury, therefore, should not be instructed on whether or not the speech involved a matter of public concern. Nor should it be instructed on whether or not the employee’s free speech interest outweighed the employer’s interest. These questions of law must be determined by the court, and they must be decided prior to any issue of damages being determined by the jury.

WHEREFORE, Defendants City of Montgomery and Kelly Gordon move this Honorable Court to deny Plaintiff’s proposed jury instructions 1 and 2.

Respectfully submitted,

/s/ Wallace D. Mills  
Wallace D. Mills (MIL 090)  
Attorney for the City of Montgomery

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of May, 2007, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following parties or counsel:

J. Bernard Brannan, Jr., Esq.  
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and I hereby certify that I have also mailed by United States Postal Service the document to the above-named non-CM/ECF participants:

/s/ Wallace D. Mills  
OF COUNSEL